

**NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.**
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

FILED BY CLERK

APR 25 2011

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

SAMUEL AGUIRRE, an unmarried man,)

Petitioner,)

v.)

JOHN F. KELLIHER, JR., Judge of)
the Superior Court of the State of Arizona,)
in and for the County of Cochise,)

Respondent,)

and)

JULIA ROSE STEVENS, an unmarried)
woman; RICHARD AGUIRRE, a married)
man; and RICARDO'S RESTAURANT,)
L.L.C., an Arizona limited liability)
company,)

Real Parties in Interest.)

2 CA-SA 2011-0030
DEPARTMENT B

DECISION ORDER

SPECIAL ACTION PROCEEDING

Cochise County Cause No. CV201000809

JURISDICTION ACCEPTED; RELIEF GRANTED

Borowiec, Borowiec & Russell, P.C.
By Joel P. Borowiec

Sierra Vista
Attorneys for Petitioner

¶1 We accept jurisdiction over Samuel Aguirre’s petition for special action, *see Smith v. Mitchell*, 214 Ariz. 78, ¶ 2, 148 P.3d 1151, 1152 (App. 2006), and grant relief. The respondent judge erred by denying as untimely the petitioner’s peremptory notice of change of judge made pursuant to Rule 42(f)(1), Ariz. R. Civ. P. No trial date had been set and none of the events triggering waiver of the petitioner’s peremptory right to a change of judge had occurred. Ariz. R. Civ. P. 42(f)(1)(C), (D). Nothing in Rule 42(f)(1) supports the respondent’s apparent conclusion that, even when a trial date has not been set, a party is required to act within a certain time after learning that a particular judge has been assigned. *See Guarrascio v. Fisher*, 154 Ariz. 186, 188, 741 P.2d 319, 321 (App. 1987) (ten-day limitation for notice of change of judge when judge newly assigned “applies only in those cases in which the initial assignment or change of judge occurs within 60 days prior to the date set for trial”). Accordingly, the respondent had no discretion to reject the petitioner’s notice. *See Ariz. R. P. Spec. Actions 3(c)* (special action relief warranted if respondent abused discretion); *State v. West*, 224 Ariz. 575, ¶ 8, 233 P.3d 1154, 1156 (App. 2010) (court abuses discretion if it commits error of law).

¶2 We therefore reverse the respondent's denial of the petitioner's notice of change of judge and remand the case for reassignment pursuant to Rule 42(f)(1)(F).

/s/ *Peter J. Eckerstrom*

PETER J. ECKERSTROM, Judge

Presiding Judge Vásquez and Judge Kelly concurring.